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No. 93-1025

In the Supreme Court of the United States

OCTOBER TERM, 1993

SCOTT NICKERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether questions to grand jury witnesses posed by an Assistant U.S. Attorney who later testified at trial were "statements" subject to production under the Jencks Act, 18 U.S.C. 3500.

2. Whether any error in failing to require the government to produce under the Jencks Act, 18 U.S.C. 3500, a memorandum by the Assistant U.S. Attorney responding to a complaint of prosecutorial misconduct was harmless.

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-25a) is reported at 4 F.3d 1400. The vacated panel opinion is reported at 965 F.2d 80. A separate opinion by the original panel disposing of several further issues not considered in the panel's first opinion or by the en banc court (see Pet. App. 3a) is unreported, but the judgment is noted at 7 F.3d 236 (Table).

JURISDICTION

The judgment of the court of appeals was entered on September 24, 1993. The petition for a writ of certiorari was filed on December 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of conspiring to obstruct justice, in violation of 18 U.S.C. 371 and 1503; conspiring to make false declarations before a court, in violation of 18 U.S.C. 371 and 1623; making false declarations before a court, in violation of 18 U.S.C. 1623; endeavoring to obstruct justice, in violation of 18 U.S.C. 1503; and using false documents, in violation of 18 U.S.C. 1001. He was sentenced to 84 months' imprisonment, to be followed by three years of supervised release.

1. In 1988, petitioner's co-defendant James Rumler was convicted in the United States District Court for the Eastern District of Michigan of conspiring to import marijuana into the United States. At that trial, the government offered evidence showing that Rumler and a co-conspirator purchased an airplane for $59,000 in cash and used it to import some of the marijuana. Pet. App. 3a-4a; 965 F.2d at 81.

Petitioner's co-defendant Jerome Susskind, an attorney, represented Rumler at the 1988 trial. During the trial, the defense produced three documents purporting to show that Rumler had obtained a business loan from petitioner in 1986 to purchase the airplane. Both petitioner and Rumler testified that petitioner had lent Rumler the money in 1986 and that the loan documents were created contemporaneously with the 1986 transactions. Pet. App. 4a.

The Assistant U.S. Attorney, Stanley Janice, suspected that the loan documents were fabrications, and after the trial he initiated a grand jury investigation. Janice gave the grand jury a brief introductory

overview of the previous drug investigation, and subsequently presented and questioned several witnesses. After the grand jury returned the indictment in this case in October 1989, a different Assistant U.S. Attorney was assigned to prosecute the case. Before trial the government gave defense counsel a transcript of Janice's introductory statement to the grand jury, but not a transcript of the questions Janice posed to the grand jury witnesses. Pet. App. 6a & n.1.

Two months before the indictment in this case was returned, Rumler sent a letter to the Department of Justice alleging that Janice had engaged in misconduct during his original drug conspiracy trial. Janice was later asked to comment on Rumler's complaint, and he responded in a six-paragraph memorandum dated January 4, 1990. Pet. App. 5a.

2. The evidence at trial showed that Susskind had fabricated the loan documents about which Rumler and petitioner testified falsely during the 1988 trial. Susskind's secretary, Karen Olds, testified that in November 1988 Susskind dictated three promissory notes relating to Rumler and petitioner, and that she typed the documents the following day at Susskind's law office. Olds recalled backdating at least one of the documents with the date of August 5, although she was unsure of the year. She further testified that she made and corrected several typographical errors while preparing the documents. See 965 F.2d at 81-82.

An expert witness testified that the three loan documents, which were dated June 3, 1986, August 5, 1986, and December 5, 1986, had all been prepared at the same time and probably by the same person. He also testified that the December document had been

signed after having been placed on top of the June and August documents; and that all three documents, which were fresh-looking, had been folded together at the same time. A second expert witness testified that the typewriter and printwheel from Susskind's law office produced the same horizontal spacing, vertical spacing, line spacing and alignment found on the documents, and that the correction ribbon from Susskind's office had been used to correct mistakes on all three documents. He also testified that the documents dated June and August 1986 could not have been signed before 1987, because the ink used for Rumler's signature on those documents was not manufactured until that year. Pet. App. 8a-9a.

3. Janice testified as a government witness at trial. His testimony explained the background of the 1988 drug conspiracy trial; described the roles of Susskind, Rumler, and petitioner at the prior trial; summarized Rumler's testimony about the purchase of the airplane; described the manner in which the documents were produced by petitioner pursuant to a government subpoena; summarized petitioner's testimony about the loan documents; and explained his reasons for suspecting that the documents produced by petitioner were not genuine. Pet. App. 6a-7a.

Before cross-examination, defense counsel asked the government to provide any prior statements by Janice that were subject to production under the Jencks Act, 18 U.S.C. 3500. In particular, the defense requested: (1) Janice's memorandum to the Department of Justice responding to Rumler's complaint of prosecutorial misconduct, and (2) all "statements" made by Janice before the grand jury in addition to the overview of the marijuana investigation that had

previously been provided. The government objected that the requested materials were not subject to production under the Jencks Act, but it submitted them to the district court for an in camera examination. Pet. App. 7a.

After reviewing the memorandum and the transcript of questions asked before the grand jury, the court asked defense counsel to state his reasons for seeking disclosure. Counsel responded that the prior statements covered the same subject matter as the trial, and that he thought it "likely there may be inconsistencies." Pet. App. 8a. The district court then declined to require production of the documents, stating that its review had indicated that "there are no inconsistencies." *Ibid.*

4. A divided panel of the court of appeals held that the Jencks Act required production of both Janice's memorandum and the grand jury transcript. See 965 F.2d at 83-84.[1] The panel rejected the government's argument that any violation of the Jencks Act was harmless because the district court had found no inconsistencies between Janice's trial testimony and the materials that were not produced. *Id.* at 84-85. The court noted but explicitly declined to follow the Fifth Circuit's holding that "the district court and court of appeals may decide the issue of harmless error by comparing improperly withheld Jencks Act statements to the witness's testimony at trial, to determine whether there were any inconsistencies." *Id.* at 85 (citing *United States* v. *Welch*, 817 F.2d 273,

[1] As the en banc court later noted, the panel was under the mistaken impression that Janice's introductory statement to the grand jury had also been withheld from the defendants. Pet. App. 6a n.1.

274 (5th Cir.), cert. denied, 484 U.S. 955 (1987)). In dissent, Judge Nelson expressed doubts that the materials in question were subject to production under the Jencks Act, and concluded that in any event "[e]ven the strictest application of the harmless error doctrine should not * * * necessitate a new trial" in this case because "there is simply no reasonable likelihood that the production of Mr. Janice's letter or the grand jury transcript would have affected the verdict." 965 F.2d at 89.

On the government's petition for rehearing, the full court vacated the panel's decision and affirmed petitioner's conviction. Pet. App. 1a-17a. The court concluded that "most, if not all, of the material sought * * * under the Jencks Act did not come within the purview of the statute." *Id.* at 2a. Specifically, the court held that Janice's questions to witnesses before the grand jury "simply were not 'statements' within the meaning of the [Jencks] Act." *Id.* at 12a. In addition, because "Mr. Janice did not testify as to the complaint Mr. Rumler had lodged with the Department of Justice," the court was "more than a little dubious about the proposition that Mr. Janice's refutation of the complaint of prosecutorial misconduct in the marijuana case is a statement that relates to the testimony given by Mr. Janice in the obstruction of justice case." *Id.* at 10a, 11a.

The court found it unnecessary to resolve the latter issue, however, because it ruled that any error that might have been made in failing to require production of the Janice memorandum was harmless. Pet. App. 11a. Having reviewed the memorandum (see *id.* at 15a-16a), the court observed that a finding that there were no inconsistencies between the mem-

orandum and Janice's testimony at trial "would certainly not be clearly erroneous." *Id.* at 14a. The court recognized, however, that the absence of inconsistencies would not in itself justify withholding material otherwise covered by the Jencks Act. *Id.* at 13a. In particular, the court noted that subtle factors such as "an omission or a shift in emphasis" can sometimes also be pertinent to cross-examination of a witness. The court pointed out, however, that such considerations were not significant in this case "because the subject matter covered by Mr. Janice in his memorandum to the Department of Justice is, at best, only barely related to the subject matter covered in his direct testimony at trial." *Id.* at 14a.

The court remarked that the district court's statement that there were no inconsistencies between Janice's memorandum and his testimony "sounds very much like a finding that any error in not ordering the government to turn the statement over to the defendants would be harmless." Pet. App. 13a. It noted further that it "would have no basis for reversing" such a finding, "[a]bsent some indication of prejudice." *Id.* at 14a. Even if the district court made no finding of harmless error, however, the court of appeals observed that "[t]he government's case against these defendants was a very strong one, and it is simply not reasonable to suppose that disclosure of whatever part of the Janice memorandum might be thought to have come within the Jencks Act could have had any substantial influence on the outcome of the trial." *Id.* at 15a. The court thus concluded that "[e]ven under the strictest application of the harmless error doctrine, * * * any error in not ordering

disclosure at the time of trial was patently harmless." *Id.* at 17a.

Three of the court's thirteen judges dissented. Pet. App. 17a-25a. The dissenters concluded that the district court should have ordered the government to produce both the Janice memorandum and the grand jury transcript under the Jencks Act. *Id.* at 17a-21a. They would have provided those materials to the defendants and remanded so that the district court could determine, in the first instance, whether the Jencks Act violations were harmless. *Id.* at 21a-25a.

ARGUMENT

1. The court of appeals correctly rejected petitioner's contention (see Pet. 5-7) that the government's failure to produce the transcript of Janice's questions to witnesses before the grand jury violated the Jencks Act. That Act provides that a district court, on the motion of a defendant, shall order the government to produce "any statement * * * of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified" on direct examination. 18 U.S.C. 3500(b). The court of appeals recognized that "[m]any of the [grand jury] questions did relate to the subject matter on which Janice subsequently testified," and also that under some circumstances a lawyer's question to a witness might constitute a "statement" for Jencks Act purposes. Pet. App. 12a. After reviewing the grand jury transcripts in question, however, the court observed that Janice's questions were "purely interrogatory in character, not declarative," and that "[n]othing in the transcript * * * suggest[s] to us that there is any reason, in this case, to give the statutory

term a broader meaning than it would have in ordinary usage." *Ibid.* The court concluded that the particular questions at issue in this case "simply were not 'statements' within the meaning of the [Jencks] Act." *Ibid.* That fact-bound determination warrants no further review.[2]

2. The court of appeals also correctly concluded that any error the district court may have committed by not ordering the government to produce Janice's memorandum responding to the complaint of prosecutorial misconduct lodged against him by Rumler was harmless. This Court has previously stated, as petitioner (Pet. 10) and the dissenters below (Pet. App. 22a-23a) point out, that harmless error analysis should be applied cautiously in the case of Jencks Act violations, because of the difficulty in determining whether withheld materials could have been utilized effectively by defense counsel at trial. *Goldberg* v. *United States*, 425 U.S. 94, 111 n.21 (1976); *Clancy* v. *United States*, 365 U.S. 312, 316 (1961); *Rosenberg* v. *United States*, 360 U.S. 367, 371 (1959). As the Court observed in *Rosenberg*, however, "[t]here is such a

[2] The dissent below maintains (Pet. App. 19a-20a) that Janice's questions are Jencks Act "statements" under 18 U.S.C. 3500(e)(2), which defines "statements" for purposes of the Act to include a "stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement." That definition relates, however, to the manner in which an oral "statement" may have been recorded, rather than to what sort of verbal utterance constitutes a "statement" in the first place. If used to address the latter point, the statutory definition is simply circular: a "statement" is a verbatim record of a "statement."

thing as harmless error," even in Jencks Act cases, "and this clearly was such." 360 U.S. at 371.

As the court of appeals explained (Pet. App. 13a-14a), Janice's memorandum had little if any potential impeachment value to the defense. After reviewing the statement in question, both the court of appeals and the trial court concluded that there was no inconsistency between the statement and Janice's trial testimony. *Ibid.* Moreover, although the court of appeals recognized that "[o]utright contradiction between a witness' testimony and his prior statement is not the only" measure of a statement's potential value for purposes of cross-examination, it emphasized that more subtle factors were unlikely to be "a significant consideration" in this case "because the subject matter covered by Mr. Janice in his memorandum to the Department of Justice [was], at best, only barely related to the subject matter covered in his direct testimony at trial." *Id.* at 14a. Thus, the court of appeals correctly found that Janice's memorandum could not have been used effectively to impeach his credibility at trial.

Furthermore, the court of appeals correctly concluded that even a successful use of Janice's memorandum to attack his credibility would not have affected the outcome of the trial. The specific acts of false declaration and obstruction of justice with which petitioner was charged were established by the record of the marijuana trial in 1988 and by the testimony of other witnesses, including two experts, which clearly established that the three loan documents were created in co-defendant Susskind's law office long after their purported execution. Janice's testimony, on the other hand, was helpful primarily to

put the government's case in context and to explain its background; it was not essential to prove the elements of the offense on any count. As the court of appeals observed, "[i]f there has ever been a case in which the absence of prejudice is crystal clear, this is that case." Pet. App. 16a n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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